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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN VAUGHN ANTHONY,

Defendant and Appellant.

E070519

(Super.Ct.No. FVI08164)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lisa M. Rogan,
Judge. Affirmed with directions.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P.
Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

In 2000, defendant was sentenced to 50 years to life for crimes that included first degree residential burglary and second degree commercial burglary. After several appeals, writ petitions, and petitions for recall and resentencing to reflect changes in the law, defendant was most recently resentenced on March 13, 2018, to 25 years to life. In this appeal, defendant seeks corrections to the abstract of judgment to correctly reflect that: (1) his second degree burglary conviction was previously reduced to a misdemeanor with time served, rather than being subject to a concurrent term of 25 years to life; (2) that same conviction is for second degree burglary rather than first degree burglary; and (3) he was resentenced on the Vehicle Code section 10851 conviction, not the burglary conviction. We affirm the judgment with directions to make the requested corrections.¹

STATEMENT OF PROCEDURE

Original Sentencing and Appeal—2000-2002

In August 2000, a jury convicted defendant in count 1 of first degree residential burglary (Pen. Code § 459)²; in count 2 of unlawfully driving or taking a vehicle (Veh. Code § 10851, subd. (a)); in count 3 of second degree commercial burglary (Pen. Code, § 459); and in count 4 of petty theft with a prior (Pen. Code, § 666). The trial court found true two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-

¹ On August 2, 2018, this court ordered defendant's petition for writ of habeas corpus in case No. E070986, which raised these and other issues, to be considered with this appeal. The petition will be disposed of by separate order.

² Section references are to the Penal Code except where otherwise indicated.

(d)). At sentencing in April 2001, the court denied defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to dismiss one or both of his prior strikes. The trial court sentenced defendant to 50 years to life as follows: consecutive terms of 25 years to life for each of the burglaries (counts 1 and 3), a concurrent term of 25 years to life for driving or taking a vehicle (count 2), and a stayed term for the petty theft (count 4) under Penal Code section 654. On appeal, this court affirmed the judgment as modified to reflect an award of additional custody credits. (*People v. Anthony* (May 31, 2002, E029408) [nonpub. opn.]³)

First Proposition 36 Petition and Appeal—2013-2014

In February 2013, defendant filed a petition in the trial court for recall of sentence under section 1170.126, also known as Proposition 36. The court found defendant ineligible for resentencing on either of the indeterminate life terms because one of them, the first degree burglary, was imposed for a serious and/or violent felony under section 1170.126, subdivision (e)(1). On appeal, this court affirmed the denial order. (*People v. Anthony, supra*, 230 Cal.App.4th at p. 1182.)

Proposition 47 Petition and Appeal—2014-2016

In December 2014, defendant filed a petition in the trial court asking to have his felony convictions reduced to misdemeanors under section 1170.18, also known as Proposition 47. The court granted the petition as to counts 3 and 4 (second degree

³ Pursuant to the People's request in respondent's brief, this court takes judicial notice of its prior opinions. (*People v. Anthony, supra*, E029408; *People v. Anthony* (2014) 230 Cal.App.4th 1176; & *People v. Anthony* (June 6, 2016, E062876) [nonpub. opn.]; see Evid. Code, § 452, subd. (d).)

burglary and petty theft with a prior) and reduced them to misdemeanors, but denied it as to counts 1 and 2 (first degree burglary and driving or taking a vehicle). The court resentenced defendant to two concurrent terms of 25 years to life. On appeal, this court affirmed the orders without prejudice to consideration of a subsequent petition supplying evidence of his eligibility regarding count 2. (*People v. Anthony, supra*, E062876.)

Second Proposition 36 Petition and Habeas Proceeding—2016-2017

In June 2016, defendant filed a second petition under section 1170.126 in the trial court after the California Supreme Court held in *People v. Johnson* (2015) 61 Cal.4th 674, 695 that “an inmate is eligible for resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent.” After the trial court initially denied the petition, defendant filed a petition for writ of habeas corpus in July 2017, which the superior court granted in part in October 2017 and ordered that defendant be resentenced on count 2 (the vehicle count). At that time the trial court also denied defendant’s request to amend his habeas petition to insert a request to have the resentencing court hear a second *Romero* motion.

The Resentencing at Issue in This Appeal—2018

On March 13, 2018, the court orally resentenced defendant on the vehicle count to three years in prison with credit for all the time served, to run concurrently with the 25-year-to-life term he was already serving for the first degree burglary. However, the court erroneously referred to the vehicle count as “count 3” rather than count 2, and neither counsel corrected the error. As a result, both the minute order and the amended abstract of judgment state that the trial court resentenced defendant on count 3—the second

degree burglary conviction—to three years and the sentence for the vehicle count remained as a concurrent term of 25 years to life. In addition, the amended abstract of judgment: (1) still listed counts 3 and 4 as if they had not been previously reduced to misdemeanors with credit for time served; and (2) erroneously described the count 3 second degree burglary as a first degree burglary.

Letter to Trial Court and Further Errors—2018

On June 30, 2018, appellate counsel sent a letter to the trial court asking to have the errors corrected. On July 23, 2018, the court filed an amended abstract of judgment and a corrected minute order. However, these contained additional errors, and still did not reflect the judgment as orally pronounced. The count 3 second degree burglary, which had previously been reduced to a misdemeanor, was listed as carrying a concurrent term of 25 years to life and was still erroneously described in the abstract of judgment as first degree burglary.

DISCUSSION

Defendant argues, the People concede, and this court agrees, that the trial court should correct the clerical errors in the abstract of judgment. If there is a discrepancy between the reporter's transcript and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Here, the minute order and abstract of judgment fail to reflect the reporter's transcript, as well as prior minutes and abstracts of judgment (compare reporter's transcript pages 1-2 with supplemental clerk's transcript pages 4-5, 9), and should be corrected. In addition, there is no dispute that defendant's conviction in count 3 was for second degree burglary, not

first degree burglary. Therefore, the abstract of judgment and minutes must also be amended to reflect the actual crime for which defendant was convicted.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect a final prison term of 25 years to life on count 1 and three years concurrent on count 2, with no remaining time on the misdemeanor counts, counts 3 (second degree burglary) and 4. It should also be clarified that counts 3 and 4 are both Proposition 47 misdemeanors, each with a previous award of credit for time served. The court shall transmit the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

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RAMIREZ
P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.